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Sutherland, George

Private rights and government control

[Saratoga Springs, N.Y.]

[1917]

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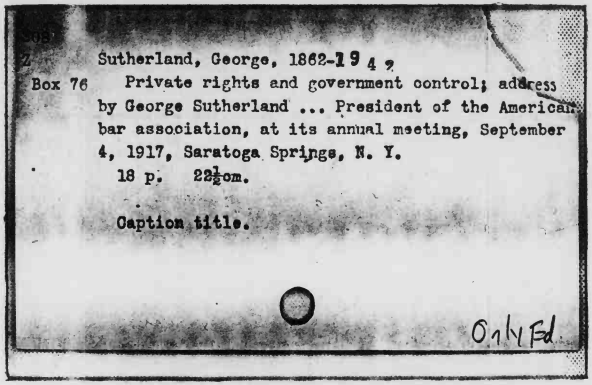
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Box 76 Private rights and government control; address by George Sutherland ... President of the American bar association, at its annual meeting, September 4, 1917, Saratoga Springs, N. Y.
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PRIVATE RIGHTS AND GOVERNMENT CONTROL.

ADDRESS BY
GEORGE SUTHERLAND,
OF UTAH,
President of the American Bar Association,
at its annual meeting, September 4, 1917, Saratoga Springs, N. Y.

From the foundation of civil society, two desires, in a measure conflicting with one another, have been at work striving for supremacy: first, the desire of the individual to control and regulate his own activities in such a way as to promote what he conceives to be his *own* good, and, second, the desire of society to curtail the activities of the individual in such a way as to promote what it conceives to be the *common* good. The operation of the first of these we call liberty, and that of the second we call authority. Throughout all history, mankind has oscillated, like some huge pendulum, between these two, sometimes swinging too far in one direction and sometimes, in the rebound, too far in the opposite direction. Liberty has degenerated into anarchy and authority has ended in despotism, and this has been repeated so often that some students of history have reached the pessimistic conclusion that the whole process was but the aimless pursuit of the unattainable. I do not, myself, share that view. In all probability we shall never succeed in getting rid of all the bad things which afflict the social organism—and perhaps it would not be a desirable result if we should succeed, since out of the dead level of settled perfection there could not come that uplifting sense of moral regeneration which follows the successful fight against evil, and which is responsible for so much of human advancement—but I am sure that in most ways, including some of the ways of government, we are better off today than we have ever been before. It is, however, apparently one of the corollaries of progressive development that we get rid of old evils only to acquire new ones. We move out of the wilderness into the city and thereby escape the tooth and claw of savage nature, which we see clearly, only to incur the sometimes deadlier

menace of the microbes of civilization, of whose existence we learn only after suffering the mischief they do. Today, as always, eternal vigilance is the price of liberty—liberty whose form has changed but whose spirit is the same. In the old days it was the liberty of person, the liberty of speech, the freedom of religious worship, which were principally threatened. Today it is the liberty to order the detail of one's daily life for oneself—the liberty to do honest and profitable business—the liberty to seek honest and remunerative investment that are in peril. In my own mind I feel sure that there never has been a time when the business of the country occupied a higher moral plane; never a time when the voluntary code which governs the conduct of the banker, the manufacturer, the merchant, the railway manager, has been finer in tone or more faithfully observed than it is today; and yet never before have the business activities of the people been so beset and bedeviled with vexatious statutes, prying commissions, and governmental intermeddling of all sorts.

Under our form of government the will of the people is supreme. We seem to have become intoxicated with the plenitude of our power, or fearful that it will disappear if we do not constantly use it, and, inasmuch as our will can be exercised authoritatively only through some form of law, whenever we become dissatisfied with anything, we enact a statute on the subject.

If, therefore, I were asked to name the characteristic which more than any other distinguishes our present-day political institutions, I am not sure that I should not answer, "The passion for making laws." There are 48 small or moderate-sized legislative bodies in the United States engaged a good deal of the time and one very large national legislature working overtime at this amiable occupation, their combined output being not far from 15,000 statutes each year. The prevailing obsession seems to be that statutes, like the crops, enrich the country in proportion to their volume. Unfortunately for this notion, however, the average legislator does not always know what he is sowing and the harvest which frequently results is made up of strange and unexpected plants whose appearance is as astonishing to the legislator as it is disconcerting to his constituents.

14 April, 1920 - CRW

This situation, I am bound to say, is not wholly unrelated to a more or less prevalent superstition entertained by the electorate that previous training in legislative affairs is a superfluous adjunct of the legislative mind, which should enter upon its task with the sweet inexperience of a bride coming to the altar. As rotation in crops—if I may return to the agricultural figure—improves the soil, so rotation in office is supposed to improve the government. The comparison, however, is illusory, since the legislator resembles the farmer who cultivates the crops rather than the crops themselves, and previous experience, even of the most thorough character, on the part of the farmer has never hitherto been supposed to destroy his availability for continued service.

I think it was the late Mr. Carlyle, who is reported to have made the rather cynical observation that the only acts of Parliament which were entitled to commendation were those by which previous acts of Parliament were repealed. I am not prepared to go quite that far, though I am prepared to say that in my judgment an extraordinarily large proportion of the statutes which have been passed from time to time in our various legislative bodies might be repealed without the slightest detriment to the general welfare.

Throughout the country the business world has come to look upon the meeting of the legislature as a thing to be borne rather than desired, and to regard with grave suspicion pretty much everything that happens, with the exception of the final adjournment, a resolution to which end, unless history has been singularly unobservant, has never thus far been withheld by general request.

The trouble with much of our legislation is that the legislator has mistaken emotion for wisdom, impulse for knowledge, and good intention for sound judgment. "He means well" is a sweet and wholesome thing in the field of ethics. It may be of small consequence, or of no consequence at all, in the domain of law. "He means well" may save the legislator from the afflictions of an accusing conscience, but it does not protect the community from the affliction of mischievous and meddlesome statutes.

A diffused desire to do good—an anxious feeling about progress—are not to be derided, of course, but standing alone and regarded from the viewpoint of practical statesmanship, they leave something to be desired in the way of complete equipment for discriminating legislative work. Progress, let me suggest, is not a state of mind. It is a fact, or set of facts, capable of observation and analysis—a condition of affairs which may be cross-examined to ascertain whether it is what it pretends to be. But you cannot cross-examine a mere longing for goodness—an indefinite, inarticulate yearning for reform and the uplift—or an uneasy, vague state of flabby sentimentalism about things in general.

In matters of social conventionality we are still rigidly conservative, but in the field of government there is a widespread demand for innovating legislation—a craze for change. A politician may advocate the complete repudiation of the Constitution and be regarded with complacency, if not with approval as an up-to-date reformer and friend of the people, but let him appear in public wearing a skirt instead of a pair of trousers and the populace will be moved to riot and violence.

The difficulty which confronts us in all the fields of human endeavor is that we are going ahead so fast—so many novel and perplexing problems are pressing upon us for solution—that we become confused at their very multiplicity. Evils develop faster than remedies can be devised. Most of these evils, if left alone, would disappear under the powerful pressure of public sentiment, but we become impatient because the force of the social organism is not sufficiently radical and the demand goes forth for a law which will instantly put an end to the matter.

The view which prevailed a hundred years ago was that the primary relation of the government to the conduct of the citizen was that of the policeman, to preserve the peace and regulate the activities of the individual only when necessary to prevent injury to other individuals or to safeguard the public; in short, to exercise what is comprehended under the term "police power." It is true that the government was not rigidly confined to these limits, but whenever it undertook to go beyond them it assumed the burden of showing clearly the necessity for so doing. The whole philosophy found its extreme expression in the Jeffersonian

aphorism—"That government is best, which governs least," while Lord Macaulay's terse summary was, "The primary end of government is the protection of the persons and property of men."

Of course with the tremendous increase in the extent and complexity of our social, economic, and political activities, alterations in the scope and additions to the extent of governmental operations become inevitable and necessary. To this no thoughtful person objects, but unfortunately the governmental incursions into the new territory are being extended beyond the limits of necessity and even beyond the bounds of expediency into the domain of doubtful experiment.

There is, to begin with, an increasing disposition to give authoritative direction to the course of personal behavior—an effort to mold the conduct of individuals irrespective of their differing views, habits and tastes to the pattern, which for the time being has received the approval of the majority. Under this process we are losing our sense of perspective. We are constantly bringing the petty shortcomings of our neighbors into the foreground so that the evil becomes over-emphasized, while the noble proportions of the good are minimized by being relegated to the background. We have developed a mania for regulating people. We forbid not only evil practices, but we are beginning to lay the restraining hand of the law upon practices that are at the most of only doubtful character. We not infrequently fail to distinguish between crimes and vices, and we are beginning almost to put in the category along with vices and offensive habits any behavior which happens to differ from our own.

I do not, for example, question the moral right of the majority to forbid the traffic in intoxicating liquor, nor its wisdom in doing so. No doubt the world would be better off if the trade were entirely abolished, but some of the states have recently gone to lengths hitherto undreamed of in penalizing the mere possession of intoxicating liquor and—since no one can use liquor without having the possession of it—thereby penalizing its personal use no matter how moderate such use may be. To put the consumer of a glass of beer in the penitentiary along with the burglar and the highwayman is to sacrifice all the wholesome distinctions which for centuries have separated debatable habit

from indisputable crime. Such legislation, to say the least, constitutes a novel extension of the doctrines of penology. Hitherto, laws on the subject have taken the form of prohibiting and penalizing the traffic, but not the personal use, which seems to have been quite generally regarded as falling outside the scope of the criminal law. The use of intoxicants or tobacco, however injurious to the user, has not generally been thought to involve the element of immorality. Hence the attempt to coerce an abandonment of such use by punitive legislation directed against the user, however desirable the result itself may be, will inevitably run counter to the sentiment, still rather widely entertained, that the imposition of criminal penalties for any purely self-regarding conduct, can only be justified in cases involving some degree of moral turpitude.

It does not require a prophet to foresee that laws of this character exacting penalties so utterly disproportionate to the offense, can never be generally enforced, and to write them into the statutes to be cunningly evaded or contemptuously ignored will have a strong tendency to bring just and wholesome laws dealing with the liquor question into disrepute.

It is sometimes a matter of nice discrimination to determine, as between the liberty of the citizen and the supposed good of the community, which shall prevail. The liberty of the individual to control his own conduct is the most precious possession of a democracy and interference with it is seldom justified except where necessary to protect the liberties or rights of other individuals or to safeguard society. If widely indulged, such interference will not only fail to bring about the good results intended to be produced, but will gravely threaten the stability and further development of that sturdy individualism, to which is due more than any other thing our present advanced civilization.

In passing legislation of this character doubts should be resolved in favor of the liberty of the individual and his power to freely determine and pursue his own course in his own way should rarely be interfered with, unless the welfare of other individuals or of society clearly requires it. "Human nature," says Mill, "is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree which requires to

grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing."

Human nature is so constituted that we freely tolerate in ourselves what we condemn in others, and we are prone to condemn traits of character in others simply because we do not find the same traits in ourselves. Very often the evil is in the eye of the beholder rather than in the thing beheld, for he is a man of rare good sense who can always distinguish between an evil thing and his own prejudices.

One objection to governmental interference with the personal habits, or even the vices of the individual, is that it tends to weaken the effect of the self-convincing moral standards and to put in their place fallible and changing conventions as the test of right conduct, with the consequent loss of the strengthening value to the individual of the free exercise of his rational choice of good rather than evil. *Enforced* discipline can never have the moral value of *self*-discipline, since it lacks the element of co-operating effort on the part of the individual which is the very soul of all personal advancement.

We may, therefore, well pause to consider whether the benefits which will result to society from a given interference of this character are sufficiently important to compensate for the loss of that fine sense of personal independence, which more than any other quality has enabled the Anglo-Saxon race to throw off the yoke of monarchical absolutism and substitute democratic self-government. It must not be forgotten that democracy is after all but a *form* of government whose justification must be established in the same way that the justification of any other form of government is established; namely, by what it does rather than by what it claims to be. The errors of a democracy and the errors of an autocracy will be followed by similar consequences. A foolish law does not become a wise law because it is approved by a great many people. The successful enforcement of the law in a democracy must always rest primarily in the fact that on the whole it commends itself to a universal sense of justice, shared even by those who violate it. Any attempt, therefore, to curtail the liberties of the citizen, which shocks the sense of personal independence of any considerable proportion of the community is likely to do more harm than good, not only because a strong

feeling that a particular law is unjust lessens in some degree the reverence for law generally, but because such a law cannot be successfully enforced, and a law that inspires neither respect for its justice nor fear for its enforcement is about as utterly contemptible a thing as can be imagined.

Another thing which may well give concern to thoughtful men is the tremendous increase during late years in the number and power of administrative boards, bureaus, commissions and similar agencies, the insidious tendency of which is to undermine the fundamental principle upon which our form of government depends; namely, that it is "an empire of laws and not of men"; the meaning of which is that the rights and duties of the individual as a member of society must be defined by pre-established laws and not left to be fixed by official edict as they may be called into question from time to time. The American people have heretofore enjoyed a greater freedom from vexatious official intermeddling and arbitrary governmental compulsion than perhaps any other people in the world. Despotism has found no place among us because we have been subject to no restraint save the impartial restraint of the law, which has thus far stood superior to the will of any official, high or low.

It is not enough, however, that we should continue free from the despotism of a *supreme* autocrat. We must keep ourselves free from the *petty* despotism which may come from vesting final discretion to regulate individual conduct in the hands of lesser officials. To this end the things which organized society exacts from its members must be particularized as far as practicable by definite and uniform rules. Liberty consists at last in the right to do whatever the law does not forbid, and this presupposes law made in advance—so that the individual may know before he acts, the standard of conduct to which his acts must conform—and interpreted and applied after the act by disinterested authority—so that the true relation to one another of the conduct and the law may be clearly ascertained and declared. It is, therefore, of the utmost importance that the authority which interprets and executes the law should not also be the authority which makes it. The law must apply to all alike. The making of law is an exercise of the *will* of the state; the interpretation and application of the law is an exercise of the

reason of the judge. The legislator concerns himself with the question, Is the proposed law just in its general application? The official who administers the law has nothing to do with the abstract question of its justice; his function is to ascertain what it is and whether it has been violated. The two functions are so utterly different that the necessity of vesting them in separate hands has been long recognized. To confer upon the same man, or body of men, the power to make the law and also to administer it would inevitably result in despotic government by substituting the shifting frontiers of personal command for the definite boundaries of general, impersonal law. "The spirit of encroachment," said Washington in the Farewell Address, "tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism."

The danger, therefore, which is threatened by the multiplication of bureaus and commissions consists in the commingling of these powers. The authority conferred upon these administrative bodies is becoming less and less limited. The jurisdiction to deal with particular subjects involving the conduct of individuals is conferred in terms which tend to become increasingly indefinite.

While, however, "bureaucracy" is a word which we instinctively accept as connoting an offensive form of government, we must not allow ourselves to be carried away by mere expletives. As the tasks of government grow in magnitude, it becomes more and more difficult for the legislative authority to deal directly and completely with many matters which come within its powers. It, therefore, is becoming increasingly necessary to devolve upon administrative bureaus and commissions the duty not only of executing but to some extent of filling in the details of administrative legislation, which of necessity must continue to be expressed in terms more or less general and comprehensive.

A serious danger to the citizen in this situation, however, is likely to arise from a failure on the part of the legislative authority to lay down explicitly and with sufficient care the primary standard which fixes the limits within which the power of the bureau or commission is to operate, and another danger lies in the fact that the persons composing the bureaus and commissions under our system of political appointments may be deficient in technical learning for the work which they are called

upon to do. The duties to be performed by such bureaus and commissions are sometimes of a highly specialized character where thoroughgoing study and training are as essential as they are in the case of the judiciary.

There is moreover a growing tendency to make the findings of these bodies final, which, to be sure, obviates delay and adds a certain measure of vigor to administrative action, but on the other hand takes away the wholesome restraint afforded by the consciousness of the official that his acts are subject to review.

The result of all this is that there is being developed a system of administrative government which may easily become autocratic and oppressive. The power is conferred in such indefinite terms that the administrative board in exercising its power in effect enacts the rule and then proceeds to enforce it. By way of illustration, let me call attention to the law passed by Congress creating the so-called Trade Commission. Under this law the business operations of anywhere from three hundred thousand to half a million corporations are placed under the jurisdiction, and to a large extent at the mercy of an administrative board of five men. The law declares that "unfair methods of competition are unlawful," which provision the commission is empowered to enforce. The provision, however, is so general and indefinite that no two minds are likely to agree as to its scope and meaning. The powers of the board in this respect, therefore, cannot be determined by reference to any primary standard furnished by the law itself, and but for the fundamental guaranties of the Constitution—still subject to the saving hand of the courts of the country—they would be well nigh unlimited. We know what the phrase "unfair competition" means because the courts have told us. It consists primarily in an attempt on the part of one person to impose his goods or his business on the public as the goods or business of another. The element of fraud is a material constituent. What is meant by the phrase "unfair *methods* of competition" nobody knows, only that it means something different from the phrase "unfair competition," since it is a rule of law, as well as of good sense, that when the language of the law is altered an intent to change the meaning is presumed. What, therefore, will the commission hold to be "unfair methods of competition"—methods which are legally unfair; methods

which are economically unfair; methods which are ethically unfair; or all three and more? Will fraud be considered a necessary element in the transaction? Under this all-embracing generalization business men must look not to the law, but to the commission to tell them what they may or may not do. Whenever a case of suspected "unfair methods" is presented, the commission will not ascertain the facts and *apply* the rule, but will ascertain the facts and *make* the rule. The determination of each case will involve in effect, therefore, the making of a law applicable not to future facts, but to facts already past, and the rendering of judgment thereon.

I may say in passing that there are other extraordinary provisions in this law which are filled with menace, among them the provision empowering the commission "to investigate from time to time the organization, business conduct, practices and management of any corporation engaged in commerce" and so on, and for this purpose, as well as for the other purposes of the act, the commission is given "access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated, or proceeded against." The effect of this is to vest this board with authority to take possession of and copy all the books and private papers of every corporation which happens to be engaged in interstate commerce, whether these books relate to interstate transactions or not, because the test which determines the power of the board is simply that the corporations shall be engaged in interstate commerce. Being so engaged there is no limit as to the character of the business conduct and practices which the board may investigate.

Surely these provisions are of at least questionable constitutionality; first, because they confer a power on the board to deal with matters which may or may not relate to interstate commerce; and second, because they empower an administrative board to seize private papers and carry away copies of them without legal process and in apparent violation of the search and seizure clause of the Constitution. But irrespective of this the authority is so dangerous and far-reaching that its complete exercise will never long be tolerated by a people whose government has been builded upon the principle that the most imperious

and necessary of all political rights is the right to be secure against the exercise of arbitrary and undefined powers.

The purpose of this Trade Commission law is to *restrict* competition. The purpose of the anti-trust laws is to *enlarge* competition. To what extent will the administration of the former modify or nullify the latter? The business organizations of the country are confronted with two sets of statutes, proceeding upon partially antagonistic principles. Cases will inevitably arise where it will be difficult to determine which principle shall apply —that whch *forbids* or that which *enforces* competition. After a quarter of a century of litigation the business world has at length ascertained with some approach to certainty what are the limits of its authority to combine. It must now take up the task of learning the limits of its right to compete. How far the work of the courts in expounding the Sherman law will be upset by the administrative enforcement of the Trade Commission law cannot be foreseen, but in the meantime the business of the country must suffer another long period of anxious and injurious uncertainty. The Trade Commission itself has made little if any effort to carry into operation the sweeping powers which the law confers, so that the mischief is still latent, having had no opportunity of becoming manifest. In refraining from exercising these powers thus far the commission has shown itself wiser than the law and if that course shall be followed permanently we may experience nothing more serious than the amiable efforts of a group of highly intelligent and conscientious gentlemen to give some more or less relevant advice and render some more or less helpful service to the business men of the country; efforts which I am bound to say thus far have been productive of much good and no harm.

Nevertheless, the provisions to which I have called attention remain in the law ready to be invoked at any time with such far-reaching and injurious consequences as at present cannot be foreseen.

Not only are the business activities of the country being investigated, supervised, directed and controlled in such a multitude of ways that the banker, the merchant, and the men of industry generally are afloat upon a sea of uncertainty where if they succeed in avoiding the mines of dubious statutes by which they are surrounded, they are in danger of being blown up by an administrative torpedo, launched from one of the numerous submarine commissions by which the business waters are everywhere infested, but the government is invading and is threatening to more seriously invade the market place itself, not as a regulator, but as a participant and competitor. We seem to be approaching more and more nearly the point where the old philosophy that whatever can be done by the individual should not be done by the government even though it may be well done, is to be abandoned for the new and dangerous doctrine that whatever can be done by the government, even though it may be badly done, should not be permitted to the individual.

Steps have quite recently been taken for putting the national government into the business of manufacturing armor plate and nitrates for use in making gunpowder, which may, of course, be justified as measures for the public defense, but alternative provision is made for utilizing the nitrate plants when their product is not needed for powder—which, except in time of war, will be almost all the time—for the purpose of producing fertilizers to be sold to the farmers. While much can be said on the score of economy as to the doubtful wisdom of the government undertaking to make its own armor plate, yet after all it does not involve any departure from established governmental principles. But it is difficult to conceive of any legitimate basis for putting the federal government into the business of manufacturing manure as a trade commodity. The government is building a railroad in Alaska. Some of us opposed that as being a step in the direction of government ownership, but some excuse may be found for the action in the theory that the territory is really government property and that the same warrant exists for improving it as existed in the case of the arid lands whose reclamation was provided for by act of Congress. But Congress has gone quite beyond all this in the passage of the so-called "Ship Purchase Act" which proposes to put the government of the United States into the ocean-carrying trade as a common carrier for hire. The postmaster-general for several years has been insisting that the federal government should take over and operate the telephone and telegraph lines and the demand for government ownership and operation of the railroads is apparently growing. Personally I am opposed to all these schemes. Whatever may be said as to

the power of a particular state or municipality to engage in some specific business activity, I have never been able to understand how the federal government with its precisely enumerated and delegated powers may constitutionally engage in business. Warrant may be found in the post office clause for the operation of the telephone and telegraph lines, but the only authority, even under the most strained construction, that can be cited as authorizing the government of the United States to become a common carrier of goods and passengers by land or sea is the commerce clause which gives Congress power to *regulate* interstate and foreign commerce. I have upon another occasion discussed this question at some length and I shall not undertake to go into it now further than to say that the power which is conferred is to *regulate,* not to *do the substantive thing which is the subject of regulation.* To build a highway or even a railroad may be accepted as a regulation of commerce since its effect is to *facilitate* commerce, and thus to condition or regulate it, but the building of a road and the carrying of passengers over the road are two very different things. The building of the road may *regulate* commerce, but the carrying of passengers and goods over the road is *commerce itself,* and, under our system, always regarded as a private activity as distinguished from a governmental function. Regulation, however, is naturally and necessarily a matter for the government since it is unthinkable that one individual should have the power to regulate the activities of another individual. Had it been suggested to the framers of the Constitution that provision should be made whereby the federal government might engage in the carrying trade or in any other form of private as distinguished from governmental business, certainly the suggestion would have been instantly and emphatically rejected. The fathers intended that this should be a civil government; it was no part of their plan that it should ever become a business organization. Jealous to the last degree of individual rights and liberties their effort was to abridge rather than to extend the powers of government.

I cannot imagine any greater misfortune to the people than for the general government to acquire and operate the telegraph, telephone and railroad lines of the country. The duties imposed upon that government have already grown to vast proportions.

To add the burden of operating all the railroads and telegraph and telephone lines would be to invite disaster. Persons now in the service of the government already number over a million. If to this number we add all the employes in the service of the great private corporations now operating these instrumentalities, the three millions or more, if organized—as they undoubtedly would be organized—would practically dictate the policy of the government. If to the annual rivers and harbors "pork barrel" and the biennial public buildings "pork barrel" we should add an annual railroad "pork barrel" bill, the public expenditures would increase to such a sum that the three billion dollar Congress would be looked back to as an example of political self-restraint and economy. The Congressman from every district in addition to asking for a public building, would demand a new railroad station, a branch railroad and other expensive additions. Between the effort to decrease freight rates in order to cultivate the votes of the shippers and consumers, to increase wages in order to cultivate the labor vote, and the "log rolling" incident to the making of permanent improvements in order to make each Congressman solid with his constituents, the annual expenditures would be increased to a point beyond the wildest imaginings.

The Ship Purchase Act in one aspect presents the evil of government ownership in its worst form, for it does not propose that the government shall completely occupy the field, but that it shall partially occupy it in competition with its own citizens. The business, it is practically conceded, will not be carried on at a profit, but probably will be carried on at a loss, which of course must be recouped from taxes imposed upon the private ship owners in common with the other citizens of the country. Think of a government in time of peace—for I recognize that anything may be justified in time of war—embarking in a business enterprise and taxing its own competitors to the end that the business may be carried on to their injury and perhaps to their ultimate ruin and bankruptcy, for successful competition between the government to whom profits are of no concern and the citizen to whom profits are vital, is of course impossible.

If the government were bound to an observance of the same conduct which it enjoins upon the citizen, the situation might present a case under the law forbidding "unfair methods of

competition" for the thoughtful consideration of the Federal Trade Commission.

The regulation and control of merely self-regarding conduct, the multiplication of administrative boards and similar agencies and the invasion of the field of private business, which I have thus far particularized, illustrate rather than enumerate the various tendencies of modern legislation and government to depart from those sound and wholesome principles which hitherto have been supposed to operate in the direction of preserving the individual against undue restraint and oppression.

Class legislation, the most odious form of legislative abuse, is by no means infrequent. In state and nation statutes are to be found which select for special privilege one class of great voting strength or set apart for special burdens another class of small numerical power at the polls.

Next to the separation and distribution of the legislative, executive and judicial powers, the most important feature of our plan of government is the division of the aggregate powers of government between the nation and the several states, to the one by enumeration and to the other by reservation. I believe in the most liberal construction of the national powers actually granted, but I also believe in the rigid exclusion of the national government from those powers which have been actually reserved to the states. The local government is in immediate contact with the local problems and should be able to deal with them more wisely and more effectively than the general government having its seat at a distance. The need of preserving the power and enforcing the duty of local self-government is imperative, and especially so in a country, such as ours, of vast population and extent, possessing almost every variety of soil and climate, of greatly diversified interests and occupations, and having all sorts of differing conditions to deal with. There is, unfortunately, however, a constantly growing tendency on the part of the general government to intrude upon the powers of the state governments, more by way of relieving them from responsibilities they are willing to shirk than by usurping powers they are anxious to retain. Especially does any inroad or suggested inroad upon the federal treasury for state purposes meet with instant and hearty approval. The grave danger of all this is that the ability as well as the desire

of the people of the several states to carry their own burdens and correct their own shortcomings will gradually lessen and finally disappear, with the result that the states will become mere geographical subdivisions and the federal character of the nation will cease to exist save as a more or less discredited tradition.

These and many other matters afford temptation to further discussion to which I cannot yield without undue trespass upon your patience, which I feel has already been quite sufficiently taxed.

Fifty years ago a great French writer—Laboulaye, I think it was—speaking through the lips of one of his American characters, uttered these words of wisdom and of power, words which are as true today as they were when they were written:

"The more democratic a people is, the more it is necessary that the individual be strong and his property sacred. We are a nation of sovereigns, and everything that weakens the individual tends toward demagogy, that is, toward disorder and ruin; whereas everything that fortifies the individual tends toward democracy, that is, the reign of reason and the Evangel. A free country is a country where each citizen is absolute master of his conscience, his person, and his goods. If the day ever comes when individual rights are swallowed up by those of the general interest, that day will see the end of Washington's handiwork; we will be a mob and we will have a master."

It is now as it has always been, that when the visionary or the demagogue advocates a new law or policy or scheme of government which tends to curtail the liberties of the individual he loudly insists that he is acting for the general interest and thereby surrounds his propaganda with such a halo of sancity that opposition or even candid criticism is looked upon as sacrilege.

But the time has come when every true lover of his country must refuse to be misled or overawed by specious claims of this character. Individual liberty and the common good are not incompatible, but are entirely consistent with one another. Both are desirable and both may be had, but we must demand the substance of both and not accept the counterfeit of either. Crimes, we are told, have been committed in the name of liberty. But either the thing that was called a crime was no crime or the name of liberty was profaned, as though one should become an

anarchist in the name of order. Liberty and order are the two most precious things beneath the stars. The duty which rests upon us of this generation is the same that has rested upon all the generations of the past: to be vigilant to see and resolute to repel every attempt, however insidious or indirect, to destroy liberty in the name of order, or order in the name of liberty, for the alternative of the one is despotism and of the other the mob.

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